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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-581

LEAGUE TO SAVE LAKE TAHOE, INC., a California membership corporation; CLAUDIA CORUM; DONNA ATHERTON; HILTON ATHERTON; JERRY FELDMILLER; MARILYN FELDMILLER; MARK LITZ; JOHN McCAULEY; JOHN CALLISTER; BRUCE BOHLMAN; DELTA MACK; PHIL HANNIFAN; JANET HANNIFAN; and JEFF HARRY,
Petitioners,

vs.

ROGER S. TROUNDAY, Director of the Nevada Department of Human Resources; STATE OF NEVADA; NEVADA DEPARTMENT OF HUMAN RESOURCES; OLIVER KAHLE; and TED JENNINGS,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Roger S. Trounday, Director of the Nevada Department of Human Resources; State of Nevada; Nevada Department of Human Resources; Oliver Kahle; and Ted Jennings, jointly file this Brief in Opposition to the Petition for Writ of Certiorari.

ISSUES PRESENTED FOR REVIEW

1. Whether the Federal District Court has jurisdiction to review an administrative determination of a State official to issue a registration certificate in accordance with the provisions of a state implementation plan.

2. Whether an alleged violation of an ambient air quality standard constitutes a violation of an "emission limitation" within the meaning of § 304 of the Clean Air Act (42 U.S.C. 7604).

3. Whether Appellants are entitled to judicial review of administrative action if they fail to pursue the administrative remedies available under a state implementation plan.

4. Whether the Nevada complex or indirect source review regulations remain enforceable in light of an express statutory prohibition.

STATUTES INVOLVED

The statutes involved are the Federal Clean Air Act (42 U.S.C. 7401 et seq.) and the Nevada Air Quality Regulations adopted pursuant to the Federal Clean Air Act.

STATEMENT OF THE CASE

This action was commenced by the League to Save Lake Tahoe (hereinafter "League") under the citizen suit provisions of the Clean Air Act seeking judicial review of the issuance by Respondent Trounday, the Director of the Nevada Department of Human Resources, of Registration Permits to Respondents Jennings and Kahle, in accordance with the Nevada State Air Quality Regulations.

Prior to 1977, the Nevada Air Quality Regulations (Appendix A) which constitute Nevada's State Implementation Plan (SIP), adopted pursuant to the mandates of the Clean Air Act, required developers of complex or indirect sources of air pollution to obtain a Registration Certificate prior to the commencement of construction.

On August 12, 1974, both Jennings and Kahle made applications for Registration Certificates for the parking facilities associated with their respective projects. The League participated in the administrative review process by Trounday. Trounday required additional submittals and project modifications of both Jennings and Kahle. After over eight months of review, Trounday issued the registration certificates to Jennings and Kahle on April 15, 1975, and May 19, 1975, respectively. One year later, on May 3, 1976, the League commenced this action seeking judicial review of the decision of Trounday to issue the certificates, alleging that Trounday "abused his discretion" and that the registration permits will result in prospective violation of the ambient air standards. The League did not pursue administrative remedies available under the Nevada Air Quality Regulations. Administrative procedures are available to review any decision by Trounday in issuing a registration certificate. Both Nevada Revised Statute 445.498 et seq. (Appendix B) and Section 2.10 of the Nevada Air Quality Regulations provide for appeals by an aggrieved party from the issuance of any such order to the Nevada Environmental Commission. When such an appeal is requested, the Nevada Environmental Commission is required to hold a public hearing and may subpoena witnesses and take testimony under oath and make a complete factual record and findings. (Appendix D). The League completely ignored all administrative remedies, and then one year after the subject permits were issued commenced the within action.

Indirect source review provisions have always been a subject of some controversy under the Clean Air Act. At last count, only eight states have an active indirect source review program and four other states have taken the steps necessary to eliminate indirect source review from their

administrator to promulgate plans or regulations which includes such programs. . . .

"Under the conference provision, any state or local government may adopt and enforce an indirect source program if it chooses. Any state or local government which has such a program would be free to leave such program in effect. The administrator may approve or enforce an indirect source program if it is adopted and submitted by a state. Any such program which has already been approved by the administrator may remain part of the applicable implementation plan. *However any state at any time may suspend or revoke such a program.*" (Emphasis added). H.R. Conf. Rep. No. 95-564, 95th Congress, 1st Sess., 126 (August 3, 1977), Reprinted in 1977 U.S. Code Congress and Administrative News 2636-37.

Thus, there is no longer any enforceable indirect source review provision under the Nevada SIP, and a decision in this case in favor of Petitioners would have no meaning.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Petitioners have not specified any reason for the granting of a Writ of Certiorari in accordance with Rule 19 of this Court. The decision of the Ninth Circuit Court of Appeals is not in conflict with any decision of another court of appeals or with any applicable decisions of this Court. Apparently, Petitioners contend that this case involves an important question of Federal law which has not been, but should be settled by this Court. However, this case involves a judicial review of an administrative decision of a Nevada state official which decision was rendered under provsions

respective implementation plans. (See Connecticut Revision 44 Fed. Reg. No. 19, p. 5425 (1979)). The 1977 amendments to the Clean Air Act revoke all authority of the EPA over indirect review programs except for federal projects. 42 U.S.C. § 7410a(5)(A). Indirect source review programs are no longer recognized as an important or effective means of air quality regulations. Thus, the present case has little or no precedential value and even less national significance.

In 1977, the Nevada State Legislature revoked all authority to review indirect sources. Nevada Revised Statute 445.493 (Appendix B). Nevada's revocation of its indirect source review regulations, together with the 1977 amendments to the Clean Air Act, raise a substantial question as to whether the present case presents a justiciable controversy. The 1977 amendments to the Clean Air Act gave authority to the states to revoke any existing indirect source review procedures contained in an SIP. This is clearly demonstrated by the following excerpt from the Congressional Record:

"The Conferees [House and Senate Conference Committee] agreed to modify the House provision which restricts the authority of the administrator to require indirect source review programs as part of the state implementation plan. The administrator, under the Conference provision, would be prohibited outright from requiring indirect source review programs, either directly or indirectly, except with respect to federally funded projects.

"This prohibition extends to the administrator's authority to require as a condition for approval the inclusion or *retention* of these programs in a state implementation plan as well as the authority of the

of the Nevada SIP which are no longer in effect. Thus, there is no question of federal law of sufficient import to warrant review by this Court.

I

THE COURT OF APPEALS WAS CORRECT IN RULING THAT NEVADA'S COMPLEX SOURCE LIMITATION WAS SATISFIED BY THE ISSUANCE OF A PERMIT, NOTWITHSTANDING THAT A PROPOSED SOURCE MIGHT VIOLATE AMBIENT AIR QUALITY STANDARDS

Petitioners contend that notwithstanding the fact that Respondents Kahle and Jennings complied with all aspects of Nevada's State Implementation Plan in securing registration certificates, the mere allegation that Respondent Trounday (Director of Department of Human Resources) failed to consider CO levels under the most adverse meteorological condition and that construction will cause violation of ambient air standards for CO, states a claim for relief under the Citizens Suit Provisions of the Clean Air Act. (42 U.S.C. 7604). It is respectfully submitted their contention is untenable for reasons stated hereinafter.

Petitioners complain that the Court of Appeals (1) shows a fundamental misunderstanding of Petitioner's claim and the nature of a Citizens Suit under the Clean Air Act (Petitioners' brief, Page 14) and (2) fails to grasp the distinction between the substantive limitation and procedural enforcement mechanism (Petitioners' Brief, Page 15).

In reply thereto, it is respectfully submitted that Petitioners are the ones with the fundamental misunderstanding of the nature of a Citizens Suit under the Clean Air Act and the limitations upon the bringing of such suit.

The right to sue under Section 304(a) of the act may be exercised against any person "Alleged to be in violation of (A) an emission standard or limitation under this Chapter or (B) an Order issued by the Administrator of a State with respect to such a standard or limitation."

When Petitioners commenced their suit in 1976, Section 304(f) defined "Emission Standard or Limitation" as "A schedule or timetable of compliance, emission limitation, standard of performance, or emission standard," or "a control or prohibition respecting a motor fuel or fuel additive. . . ."

The term "Emission Limitation" was generally interpreted by the Courts to include only specific restrictions on the composition of pollutants, which may be emitted into the air from a particular source or class of sources. See *Train v. Natural Resources Defense Council,* 421 U.S. at 79, 95 S.Ct. at 1481.

In referring to the restrictive definition of "Emission Standard or Limitation." the Ninth Circuit stated, "Strictly applied, these restrictive definitions of 'emission standard or limitation' might effectively foreclose Appellant's contention that the indirect source permitting procedure alleged to have been violated in this case is an 'emission limitation,' and, were there no subsequent amendments of the Act, we would be compelled in this case to find no jurisdiction under Section 304." (Petitioners' Appendix B, Page 8).

The Ninth Circuit went on to hold that since the decision of the District Court, Section 304(f) (42 U.S.C. 7604(f))

has been amended, and the definition of "emission standard or limitation" substantially extended. This expansion broadened Federal Jurisdiction to include an alleged violation of any condition or requirement of a State Implementation Plan relating to "transportation control measures or air quality maintenance plans."

The Ninth Circuit held, in effect, that subject matter jurisdiction had been retroactively granted. However, none of the authorities relied upon by the Ninth Circuit dealt with the question of whether a court's subject matter jurisdiction can be retroactively expanded. In addition, a proper analysis of the 1977 amendments to the Clean Air Act indicate that the expanded definition of emission limitation does not include indirect source review programs of parking garages.

The 1977 amendments to the Clean Air Act do not expand the citizen suit provisions to include preconstruction permit requirements for indirect sources. In *Hancock v. Train*, 426 U.S. 167 (1976), this Court held that the "requirements" with which a federal facility must comply under Section 118 of the Clean Air Act (42 U.S.C. § 1718) were the same as the emission standards and limitations for which citizens suits were authorized under Section 304 of the Clean Air Act (42 U.S.C. § 7604). This Court went on to hold that the preconstruction permit procedure in question in *Hancock* was not within those "requirements" and, thus, was not an emission limitation or standard. In response to the *Hancock* case, Congress acted to expand the definition of "requirements" contained in 42 U.S.C. § 7418 to include all requirements, whether substantive or procedural, including "any requirement respecting permits." Congress thereby clearly provided that federal facilities must now comply with the permit procedures contained in a state implementation plan. On the other hand, when Congress amended the definition of emission limitation under the citizens suit provisions of the Clean Air Act (42 U.S.C. § 7604(f)), it did not include any preconstruction or permit requirements for indirect sources. Indeed, Congress expanded the definition of emission limitation to specifically include a requirement for a permit under Part C of Subchapter I of the Act. 42 U.S.C. § 7604(f)(2). That permit is not, however, applicable in the present case. Congress did not make the same provision in the expanded definition of emission limitation as it did in the case of the definition of "requirements" to include all permit requirements. The specific inclusion of a permit requirement in the amendments to 42 U.S.C. § 7418 and the absence of such a provision in the citizens suit section is a clear indication of Congressional intent not to change this Court's decision in *Hancock v. Train* with respect to the limitations on citizens suits seeking judicial review of preconstruction permits for indirect sources.

Petitioners predicate their right to sue under Section 304 on the fallacious assumption that violation of an ambient Air Quality standard is *ipso facto* a violation of an emission limitation. This is clearly not the case. As the Circuit Court stated, "To adopt their view would not only contravene the principal that such air quality standards are not emission limitations (Citations omitted) but would also sanction Federal jurisdiction based solely upon allegations of a prospective violation of the ambient air quality standards. (Petitioners' Appendix B, Page 14)

Emission standards or limitations were meant to establish "objective evidentiary standards," which would have to be met by Plaintiffs in citizens suits." *Citizens Association of Georgetown v. Washington,* 535 F.2d 1318, 1322 (D.C. 1974). The Circuit Court found that "these objective standards" include the procedural provisions of the Nevada State Implementation Plan.

In the District Court decision, Judge Thompson stated, "The Congressional findings state: 'That the prevention and control of air pollution out of source is the primary responsibility of States and local governments.'" (Petitioners' Appendix A, Page 7)

He further defined the federal-state relationship saying: "There are other provisions of the statutory and regulatory swamp which support the Congressional intent to defer to approved State regulatory procedures in administration, maintenance and enforcement of ambient air quality requirements." (Petitioners' Appendix A, Page 9)

It is respectfully submitted that there was complete compliance with all of the requirements of the Nevada Plan, and Petitioners are simply attempting, through this action, to obtain in Federal Court review of an administrative decision entrusted by Congress to state officials. The mere allegation of a prospective violation of an ambient air quality standard cannot thusly be used as a basis for Federal jurisdiction.

II

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT APPELLANTS FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED

In a carefully drafted and instructive opinion, the Court of Appeals decided that the indirect source review requirements of Nevada's SIP constituted an "emission standard or limitation" under § 304(f)(3), 42 U.S.C. § 7604(f)(3). (Petitioners' Appendix B, p. 11) In essence, the Court of Appeals decided that the District Court had jurisdiction under § 304, 42 U.S.C. § 7604, to consider the alleged violations of the Nevada indirect source regulations. (Petitioners' Appendix B, p. 13) After having found that the District Court had jurisdiction to consider alleged violations of Nevada indirect source regulations, it is important to note that the Court of Appeals went no further. Instead, the Court of Appeals exhibited a great deal of insight in deciding that although the District Court could lawfully have considered the alleged violations of the Nevada indirect source regulations, a thorough and exhaustive analysis of appellants' complaint demonstrated total compliance with the Nevada indirect source regulations.

In an attempt to circumvent the Court of Appeals decision, the appellants incorrectly characterize their second issue before this Court. (Petition for Writ of Certiorari, p. 4) The appellants couch their second issue in the abstract in an attempt to eliminate this Court's consideration of the extremely important facts in the case at bar. More importantly, however, appellants in requesting this learned Court to rule on whether a citizen suit under the Clean Air Act § 304 is merely a procedure to review a

state agency determination, or whether it constitutes a distinct, independent cause of action when a state has issued a permit under its implementation plan, raise for the first time in this litigation this abstract issue. As recognized by this Court in *Tennessee v. Dunlap,* 426 U.S. 312, 314 n.2, 315 n.3 (1976), due to the fact that appellants' second issue was not pleaded in appellants' complaint and was not considered by the District Court or the Court of Appeals, it is not now properly before this Court.

Not only is the appellants' second issue not properly before this Court at this late stage, but in its present broad posture need not be answered in order to support the Court of Appeals decision. Indeed, appellants have either created a masterful smoke screen in presenting their second issue or have failed to understand the succinct and straightforward language of the Court of Appeals.

In resolving the case at bar, the Court of Appeals in no way, shape or form concluded that a citizen suit under the Clean Air Act § 304, 42 U.S.C. § 7604, is merely a procedure to review a state agency decision. Instead, as has long been recognized, the Court of Appeals ruled that without having first exhausted their administrative remedies pursuant to the federally promulgated State Implementation Plan (See discussion under Section III, *infra*) and by failing to allege facts constituting a violation of a specific emission limitation (Petitioners' Appendix B, p. 16) appellants were not entitled to relief in a federal forum. Not only did appellants fail to establish facts which constitute a violation of a specific emission limitation but instead through pleading their alleged cause of action affirmatively established compliance by the State of Nevada

with the procedural and enforcement requirements of its state implementation plan. (Amended Complaint, Appendix C, Paragraphs 12 and 13)

As correctly noted by the Court of Appeals, appellants argue that when the two hotel casinos are constructed they will violate applicable ambient air quality standards for carbon monoxide and, therefore, by issuing the required registration certificates the respondents have violated an emission standard or limitation. (Appendix C, pp. 5-7) However, as depicted by the Court of Appeals, appellants' argument demonstrates a fundamental misunderstanding of the long recognized difference between a violation of an ambient air quality standard and a violation of an emission standard or limitation. *Plan for Arcadia, Inc. v. Anita Associates,* 501 F.2d 390, 392 (9th Cir.), *cert. denied,* 419 U.S. 1034 (1974); *Thompson v. Chicago,* 7 E.R.C. 1682 (N.D. Ill. 1975); *New Mexico Citizens v. Train,* 6 E.R.C. 2061, 2064 (D.N.M. 1974). The appellants have not and in fact could not allege a violation of an emission standard or limitation because respondents have complied with the Nevada SIP in all respects. In light of this fact, appellants concocted, as the basis for their cause of action, a prospective violation of the ambient air quality standard for carbon monoxide. (Appendix C, p. 7) Much to the appellants' chagrin, a prospective violation of the ambient air quality standards does not repose in the federal courts any subject matter jurisdiction. *Thompson v. Chicago, supra,* and *New Mexico Citizens v. Train, supra* at 2064.

In affirming the District Court's decision dismissing the appellants' complaint, the Court of Appeals incisively ruled that respondents complied in every respect with the Nevada

SIP and that therefore appellants had failed to allege facts which constituted a violation of a specific emission limitation. The Court of Appeals did not find that a citizen suit under § 304 of the Clean Air Act (42 U.S.C. § 7604) was merely a procedure to review a state agency action. Accordingly, a determination by this Court of appellants' second issue is unnecessary.

III

APPELLANTS WHO DESIRE REDRESS IN A FEDERAL FORUM FOR ALLEGED VIOLATION OF THE NEVADA STATE IMPLEMENTATION PLAN MUST FIRST EXHAUST THEIR ADMINISTRATIVE REMEDIES PURSUANT TO THE NEVADA STATE IMPLEMENTATION PLAN

In attempting through this action to obtain Federal Court review of an administrative decision entrusted by Congress to state officials, appellants are seeking to enforce those portions of Nevada's SIP which they believe will enhance their position while at the same time wholly disregarding those sections which preclude this action. (Petitioners' Appendix B, p. 15, *Train v. Natural Resources Defense Council*, 421 U.S. 60, (1975) and 42 U.S.C. 7401(a)(3), 7407(a). The appellants have continually asserted that the Nevada SIP is federal law, and if it is, so are all the administrative procedures provided therein. Accordingly, appellants' abusive practice of "picking and choosing" those provisions of the Nevada SIP with which they will and will not comply cannot be condoned by this or any other court.

In citing allegedly relevant portions of the Nevada SIP, appellants conspicuously omit what are perhaps the most important sections. Those omitted portions address the comprehensive administrative review process under the Nevada SIP. (Appendix D sets forth the State of Nevada Environmental Commission Administrative Rules and Appendix B sets forth the Nevada Revised Statutes which govern both the administrative and judicial review processes in the Nevada SIP).

In looking at appellants' tenuous position, it becomes readily apparent why appellants chose to mention only those portions which proved beneficial to them. However, as recognized by this Court as long ago as 1938, it is "[t]he long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. [citations]" *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). The sound policy for this long-settled rule is found in the case of *McKart v. United States*, 395 U.S. 185 (1969) wherein this Court stated the following:

> "The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. Since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise.
>
> . . .

"Particularly, judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. In addition, other justifications for requiring exhaustions . . . have nothing to do with the dangers of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his right to the administrative process. If he is required to pursue his administrative remedies, the court may never have to intervene. And notions of administrative autonomy require that the agency be given the chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of the administrative process could weaken the effectiveness of the agency by encouraging people to ignore its procedures." Id. at 193-195.

Accordingly, having been provided with this guidance from this Court, the learned United States Court of Appeals for the Ninth Circuit has continually recognized this long-settled rule (*See American Federation of Government Employees, Local 1668 v. Dunn*, 561 F.2d 1310, 1314-15 (9th Cir. 1977); *Shell Oil Company v. Train*, 585 F.2d 408, 414 (9th Cir. 1978); and *California Tahoe Regional Planning Agency v. Jennings, et al.*, 594 F.2d 181, 190-92 (9th Cir. 1979)) and under the facts of the case at bar, correctly decided that any administrative determination made by Nevada officials pursuant to provisions of the Nevada SIP, should be appealed through the administrative review procedures as set forth in the Nevada SIP.

The Nevada SIP provides that an appeal of any action of Trounday may be taken directly to the Nevada Environmental Commission. Nevada Revised Statutes 445.501 (Appendix B; § 2.10 of the Nevada Air Quality Regulations (Appendix A). In addition to having a right of appeal, an aggrieved party is entitled to an immediate hearing on their appeal which must be conducted within twenty (20) days after a receipt of request for a hearing. Rule 9, State of Nevada Environmental Commission Administrative Rules. (Appendix D) In requiring an aggrieved party to file a notice of appeal within ten (10) days after notice of action of the department, (*See* NRS 445.498 and Rule 8, State of Nevada Environmental Commission Administrative Rules) as well as providing a hearing therein within twenty (20) days of receipt of request for hearing (*See* NRS 445.499 and Rule 9, State of Nevada Environmental Commission Administrative Rules), the Nevada SIP furnishes a comprehensive mechanism for an expedited review. Both the Nevada Revised Statutes and the Nevada Environmental Commission Administrative Rules provide that when an appeal is taken the Commission may subpoena witnesses, take testimony under oath, and make a complete factual record and findings. NRS 445.599 and Nevada Environmental Commission Administrative Rules 9-15. It is readily apparent that through this exhaustive administrative scheme, appellants had adequate administrative remedies available. The review of Trounday's decision under the Nevada SIP does not end with the Nevada Environmental Commission. Any decision or order of the Environmental Commission is subject to judicial review in accordance with NRS 233(B) which is the Nevada Administrative Procedures Act. (Appendix B) Through their amended complaint, appellants alleged that Trounday's decision constituted an abuse of discretion; however, despite

the fact that the Nevada SIP through NRS 233B.140(5)(b) specifically provides for reversal of Trounday's decision if said decision constituted an abuse of discretion, appellants made absolutely no attempt to follow this portion of the Nevada SIP. Having intentionally failed to follow the administrative and judicial review processes in the Nevada SIP, as approved by EPA, the appellants came knocking at the doors of the federal court, which are and should remain closed.

CONCLUSION

This case is another in a continuing series of harassing litigation brought by Petitioners against Respondents over the last five years. It lacks merit; it does not involve an important question of Federal law; it does not conflict with a decision of another Court of Appeals. This is not an appropriate case for this Court to exercise its discretionary review authority. It is therefore respectfully submitted that the Petition For Writ of Certiorari be denied.

Dated, 4 October 1979.

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Appendices

Appendix A

State of Nevada

Air Quality Regulations

October 1976

Amended February 1977

Amended April 1977

Amended May 1977

John Fransway, Chairman
Ellen Shirley
William C. Vincent
Thorne Butler, M.D.
Roland Westergard
Thomas Ballow
Glen Griffith
Lowell Smith
Clark H. Tester
Ken Boyer, Executive Secretary

Adopted By
Nevada State Environmental Commission
John Fransway, Chairman

Administered By
Department of Human Resources
Roger Trounday, Director
Environmental Protection Services
E. G. Gregory, Acting Administrator
Carson City, Nevada

and

Department of Motor Vehicles
Howard Hill, Director
Carson City, Nevada

2.8.7—All administrative fines collected by the Commission pursuant to these regulations shall inure to and be deposited in the county school district fund of the county in which the violation occurred.

2.9—Time for Compliance:

2.9.1—All new and existing sources shall comply with these regulations. Existing sources are in compliance with these regulations and may continue to operate under the provisions of their approved compliance schedules, which may be amended from time to time.

2.92—Compliance schedules shall contain specific progress steps that will be taken toward achieving compliance.

2.9.3—The Commission may require periodic reports on each phase of progress under approved compliance schedules. Failure at any phase to make diligent and reasonable progress toward compliance with the approved compliance schedule shall be deemed an unreasonable delay and shall subject the operator of the source to administrative fines as provided in Article 2.8.2 of these regulations.

2.9.4—In approving compliance schedules, the Commission shall take into consideration the social and economic impact of the schedule, including, but not limited to, impact on availability of fuels, energy, transportation, and employment.

2.9.5—When in the opinion of the Director there is a violation of any provision of these regulations or approved compliance schedule, he shall cause a written notice to be served upon the person responsible for the alleged violation.

2.9.6.—The written notice shall specify the provision of these regulations or the approved compliance schedule that is being violated and the facts constituting the alleged violation. It may include an order to take corrective action or require submission of a schedule for compliance within a specified reasonable time. Such order shall become final unless within 10 calendar days after service of the written notice, the person named in the order requests a hearing before the Commission.

2.9.7—With or without the issuance of an order to take corrective action or require submission of a schedule for compliance within a specified reasonable time, the Director may require the person to appear before the Commission at a specified time or place or the Commission may initiate action to levy the appropriate fine.

2.10—Appeals of the Director's Action:

2.10.1—Any person aggrieved by:

2.10.1.1—The issuance, denial, renewal, suspension, or revocation of an operating permit; or

2.10.1.2—The issuance, modification, or rescission of any other order, by the Director, may appeal to the Commission.

2.10.2—The Commission shall decide the appeal.

2.10.3—The Commission shall provide, by rule, for the time and manner in which appeals are to be taken to the Commission.

2.10.4—Application forms for appeal shall be obtained from the Director.

2.11—Variances:

2.11.1—The owner or operator of a source of air contaminant or a person who desires to establish such a source may apply to the Commission for a variance from its applicable regulations. The Commission may grant a variance only if, after public hearings on due notice, it finds from a preponderance of the evidence that:

2.11.1.1—The emissions occurring or proposed do not endanger or tend to endanger human health or safety; and

2.11.1.2—Compliance with the regulations would produce serious hardship without equal or greater benefits to the public.

2.11.2—A variance shall not be granted unless the Commission has considered the relative interest of first, the public; second, other owners of property likely to be affected by the emission; and last, the applicant.

2.11.3—The Commission may, in granting a variance, impose appropriate conditions upon an applicant and may revoke the variance for failure to comply.

2.11.4—A variance may be renewed only under circumstances and upon conditions which would justify its original granting.

2.11.4.1—Application for any renewal must be made at least 60 days prior to expiration of the variance to be renewed, and the Commission shall give public notice of the application.

2.11.4.2—If a protest against the renewal is filed with the Commission, the Commission shall hold a public hearing

and shall not renew the variance unless it makes specific written findings of fact which justify the renewal.

2.11.5—The following limitations of duration apply to all variances:

2.11.5.1—If the variance is granted because no practical means are known or available for prevention, abatement, or control of the air pollution involved, the variance shall continue only until such means become known and available.

2.11.5.2—If the variance is granted because compliance with applicable regulations will require measures which, because of extent or cost, must be spread over a period of time, the variance shall be granted only for the requisite period as determined by the Commission and shall specify the time when the successive steps are to be taken.

Appendix B

WATER CONTROLS; AIR POLLUTION

445.486 Compelling attendance of witnesses at hearings; contempt; compensation of witnesses.

1. The district court in and for the county in which any hearing is being conducted may compel the attendance of witnesses, the giving of testimony and the production of books and papers as required by any subpena issued by the chairman of the hearing.

2. In case of the refusal of any witness to attend or testify or produce any papers required by such subpena the chairman may report to the district court in and for the county in which the hearing is held, by petition setting forth:

(a) That due notice has been given of the time and place of attendance of the witness or the production of the books and papers;

(b) That the witness has been subpenaed in the manner prescribed in NRS 445.401 to 445.601, inclusive;

(c) That the witness has failed and refused to attend or produce the papers required by subpena in the hearing named in the subpena, or has refused to answer questions propounded to him in the course of such hearing,

and asking an order of the court compelling the witness to attend and testify or produce the books or papers in the hearing.

3. The court, upon petition of the chairman, shall enter an order directing the witness to appear before the court

at a time and place to be fixed by the court in such order, the time to be not more than 10 days from the date of the order, and then and there show cause why he has not attended or testified or produced the books or papers in the hearing. A certified copy of the order shall be served upon the witness. If it appears to the court that the subpena was regularly issued by the chairman, the court shall thereupon enter an order that the witness appear in the hearing at the time and place fixed in the order and testify or produce the required books or papers, and upon a failure to obey the order the witness shall be dealt with as for contempt of court.

4. Witnesses may be compensated in the amounts provided in NRS 50.225.

(Added to NRS by 1971, 1195; A 1973, 1816)

Enforcement Provisions

445.491 Registration, report of air contaminant sources; notice, approval of proposed construction; operating permits; failure of commission to act does not excuse violations.

1. The commission shall by regulation:

(a) Require the person operating or responsible for the existence of each source of air contaminant, generally or within a specified class or classes, to register and to report:

(1) The location of the source;

(2) The size and height of outlets;

(3) The process employed;

(4) The fuel or fuels used;

(5) The nature, rate and duration of emissions; and

(6) Such other information relevant to possible air pollution as the commission may specify, if such information can reasonably be made available.

(b) Require that written notice be given to the director prior to the construction, installation, alteration or establishment of any source of air contaminant or of any specified class or classes of such sources, or the alteration of any device intended primarily to prevent or reduce air pollution. If within the time prescribed by regulation the director determines that:

(1) The proposed construction, installation, alteration or establishment will not be in accordance with the provisions of the plans, specifications and other design material required to be submitted under NRS 445.401 to 445.601, inclusive, or applicable rules and regulations; or

(2) The design material or the construction itself is of such a nature that it patently cannot bring such source into compliance with NRS 445.401 to 445.601, inclusive, or applicable rules and regulations, the director shall issue an order prohibiting the construction, installation, alteration or establishment of the air contaminant source or sources.

(c) Require operating permits for any source.

2. The commission shall by regulation provide for the issuance, renewal, revocation and suspension of operating permits, and it may charge appropriate fees for their issuance.

3. Any failure of the commission or the department to issue a rule, regulation or order to prohibit any act does

not relieve the person so operating from any legal responsibility for the construction, operation or existence of the source of air contaminant.

4. All administrative fees collected by the commission from stationary sources pursuant to subsection 2 shall be deposited in the general fund of the state. This subsection shall not apply to political subdivisions or their agencies.

(Added to NRS by 1971, 1196; A 1973, 1816)

445.493 Limitations on enforcement of regulations as to indirect sources and authority to review new indirect sources.

1. No regulation adopted pursuant to any provision of NRS 445.401 to 445.601, inclusive, may be enforced as to indirect sources if it is more stringent with respect to the size cutoffs established for designated areas pursuant to the United States Clean Air Act of 1963 and the rules and regulations adopted in furtherance thereof.

2. Except as provided in subsection 3, if the United States Environmental Protection Agency delays the effective date for enforcement of its indirect source regulations beyond January 17, 1977, the authority of a state agency or district board of health to review new indirect sources shall expire. Those projects approved prior to that date shall continue under the guidelines established in their permit.

3. If the federal indirect source regulations become effective after January 17, 1977, then:

(a) The authority of a state agency to review new indirect sources may be exercised only:

(1) In the enforcement of the federal indirect source regulations; and

(2) To the extent enforcement by the state agency is required by the federal act.

(b) The governing body of each county and each incorporated city may enforce within its jurisdiction the federal indirect source regulations or any indirect source regulations it adopts which are no more strict than the federal indirect source regulations, to the extent such local enforcement is not inconsistent with the requirements of the federal act.

(Added to NRS by 1975, 1781; A 1977, 1559)

445.496. Approval of plans, specifications prerequisite to construction, alteration of structure.

1. The commission shall require, with respect to all sources of air contaminant, including indirect sources, that plans, specifications and such other information as the commission may direct be submitted to the director not later than a specified interval prior to the construction or alteration of a building or other structure if such construction or alteration includes the establishment or alteration of a source or indirect source of air contaminant.

2. The local government authority, if any, responsible for issuing any required building permit shall not issue such building permit until the registration has been made pursuant to regulation and no stop order prohibiting such construction or alteration has been issued.

(Added to NRS by 1971, 1197; A 1973, 1817; 1977, 1559)

445.497 Notice of regulatory action: Requirement; method; contents of notice. When the department takes any regulatory action, under the provisions of NRS 445.401 to 445.601, inclusive, or under any rule, regulation, order or standard based thereon, it shall give reasonable notice to all parties by certified mail, which notice shall state the legal authority, jurisdiction and reasons for the action taken.

(Added to NRS by 1973, 1809)

445.498 Appeals to commission: Notice of Appeal. A party aggrieved may file notice of appeal with the commission within 10 days after the date of notice of action of the department, except as otherwise provided by law.

(Added to NRS by 1973, 1809)

445.499 Appeals to commission: Hearings.

1. Within 20 days after receipt of the notice of appeal provided for in NRS 445.498, the commission shall hold a hearing.

2. Notice of the hearing shall be given to all affected parties no less than 5 days prior to the date set for the hearing.

3. The commission may sit en banc or in panels of three or more to conduct hearings.

4. The attendance of witnesses and the production of documents may be subpenaed by the commission at the request of any party. Witnesses shall receive the fees and mileage allowed witnesses in civil cases. Costs of subpenas shall be taxed against the requesting party.

5. All testimony shall be given under oath, and recorded verbatim by human or electronic means.

6. For the purpose of judicial review under NRS 445.571, the parties may agree upon a statement of facts in lieu of a transcript of testimony.

7. Costs of transcribing proceedings of the commission shall be taxed against the requesting party.

(Added to NRS by 1973, 1809)

445.501 Appeals to commission: Appealable matters; commission action; rules for appeals.

1. Any person aggrieved by:

(a) The issuance, denial, renewal, suspension or revocation of an operating permit; or

(b) The issuance, modification or rescission of any other order, by the director may appeal to the commission.

2. The commission shall affirm, modify or reverse any action taken by the director which is the subject of the appeal.

3. The commission shall provide by rule for the time and manner in which appeals are to be taken to the commission.

(Added to NRS by 1971, 1197; A 1973, 1818; 1977, 69)

ADMINISTRATIVE PROCEDURE ACT

233B.127 Application of chapter to grant, denial or renewal of licenses; summary suspension of licenses.

1. When the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hear-

ing, the provisions of this chapter concerning contested cases apply.

2. When a licensee has made timely and sufficient application for the renewal of a license or for a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

3. No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by certified mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Such proceedings shall be promptly instituted and determined.

(Added to NRS by 1967, 810)

233B.130 Judicial review of final decisions in contested cases.

1. Any party aggrieved by a final decision in a contested case is entitled to judicial review thereof under this chapter. Where appeal is provided within an agency, only the decision at the highest agency level is reviewable unless otherwise provided by statute. This chapter does not limit

utilization of trial de novo review where provided by statute, but this chapter provides an alternative means of review in those cases. Any preliminary, procedural or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency decision would not provide an adequate remedy.

2. Proceedings for review shall be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the act on which the proceeding is based occurred. Unless otherwise provided by specific statute, a petition shall be filed within 30 days after the service of the final decision of the agency or, if a rehearing is held, within 30 days after the decision thereon. Copies of the petition shall be served upon the agency and all other parties of record.

(Added to NRS by 1965, 966; A 1969, 318; 1975, 495; 1977, 57)

233B.140 Stay of agency decisions; record of proceedings; taking of additional evidence; limitations on judicial review; grounds for reversal, modification.

1. The filing of the petition does not itself stay enforcement of the agency decision, unless expressly so provided by statute. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

2. Within 30 days after the service of the petition, or within further time allowed by the court, agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review.

By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

3. If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings or decisions with the reviewing court.

4. The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

5. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(Added to NRS by 1967, 810; A 1977, 58)

233B.150 Appeals from final judgments of district court. An aggrieved party may obtain a review of any final judgment of the district court by appeal to the supreme court. The appeal shall be taken as in other civil cases.

(Added to NRS by 1967, 811)

Appendix C

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[Filed June 10, 1076]

United States District Court
District of Nevada

League To Save Lake Tahoe, Inc., a California membership corporation; Claudia Corum; Donna Atherton; Hilton Atherton; Jerry Feldmiller; Marilyn Feldmiller; Mark Litz; John McCauley; John Callister; Bruce Bohlman; Delta Mack; Phil Hannifan; Janet Hannifan; and Jeff Harry, **Plaintiffs,** **vs.** **Roger S. Trounday, Director of the Nevada Department of Human Resources; State of Nevada, Nevada Department of Human Resources; Oliver Kahle; and Ted Jennings,** **Defendants.**	**Civ. R.76-85,BRT**

AMENDED COMPLAINT

Plaintiffs allege:

Jurisdiction and Venue

1. The jurisdiction of this Court is based on the citizen suit provision of § 304(a) of the federal Clean Air Act, 42 U.S.C. § 1857h-2(a) and the federal question statute, 28 U.S.C. § 1331(a). The amount in controversy exceeds $10,000.

2. Venue is in the District Court for the District of Nevada under Clean Air Act § 304(c)(1), 42 U.S.C. § 1857h-2(c)(1), since the violation discussed in this complaint is occurring in this judicial district. This action is being filed in the Reno Division of this Court pursuant to Local Rule 3(a) because the action arises in Douglas County.

The Parties

3. Plaintiff League To Save Lake Tahoe, Inc. is a privately-funded non-profit membership corporation, organized and existing under the laws of the State of California. It is dedicated to preserving the environmental balance, scenic beauty, and recreational opportunities of the Tahoe Basin. Many of its members live and work in the Tahoe Basin and will be personally affected by the air pollution violations discussed in this complaint. Plaintiffs Claudia Corum, Donna Atherton, Hilton Atherton, Jerry Feldmiller, Marilyn Feldmiller, Mark Litz, John McCauley, John Callister, Bruce Bohlman, Delta Mack, Phil Hannifan, Janet Hannifan, and Jeff Harry are individuals who reside in or near the Tahoe Basin. They will be personally affected by the air pollution violations discussed in this complaint. The diminution of the value of their property

and the increased costs for health care due to these violations will exceed $10,000 for each of the individual plaintiffs.

4. Defendant Roger S. Trounday is the Director of the Nevada Department of Human Resources. He is charged with the duty of carrying out the air pollution control laws of the State of Nevada (N.R.S. §§ 445.401-445.601) pursuant to N.R.S. § 445.473(1). In that capacity, he is required to assess the air quality impact of a project which is required to obtain a registration certificate under Article 13 of the Nevada Air Quality Regulations issued by the Nevada Environmental Commission. The Department of Human Resources is the designated state air pollution control agency for the purposes of the Clean Air Act under the terms of N.R.S. § 445.456(1).

5. Defendant Oliver Kahle is the owner and operator of the Hotel Oliver, planned to be built at Stateline, Nevada. Defendant Ted Jennings is an owner and the operator of the Tahoe Palace Hotel, planned to be built at Stateline, Nevada.

6. The State of Nevada is named as a defendant pursuant to N.R.S. § 41.031, which requires the State to be named in an action against a state agency.

7. The Nevada Department of Human Resources is named as a defendant pursuant to N.R.S. § 41.031, which permits suits against state agencies.

Statement of the Claim

8. Under § 109(b)(1) of the Clean Air Act, 42 U.S.C. 1857c-4(b)(1), EPA is required to promulgate primary

ambient air quality standards which are requisite to protect the public health. EPA has promulgated such standards for carbon monoxide (CO) at 40 C.F.R. § 50.8. The maximum CO concentrations permissible under the standards are 35 parts per million for a one-hour period and 9 parts per million for an eight-hour period.

9. Section 110(a) of the Clean Air Act, 42 U.S.C. § 1857c-5(a) requires each state to submit to the federal Environmental Protection Agency ("EPA") "a plan which provides for implementation, maintenance, and enforcement" of the primary ambient standards. The State of Nevada submitted such an implementation plan to EPA and the portion thereof concerned with the CO standard was approved and accepted, 40 C.F.R. § 52.1472. That implementation plan includes the various state statutory and regulatory provisions discussed in paragraphs 10, 11 and 15.

10. Section 3.2.2 of the Nevada air quality regulations makes the obtaining of a valid registration certificate a prerequisite to the construction of any complex source of air pollution. "Complex source" is defined by N.R.S. § 445.446(2) as

> any property or facility that has or solicits secondary or adjunctive activity which emits or may emit any air contaminant for which there is an ambient air quality standard, notwithstanding that such property or facility may not itself possess the capability of emitting such air contaminants. Complex sources include, but are not limited to (a) highways and roads; (b) parking facilities . . . (d) recreation, amusement, sports, or entertainment facilities.

Sections 13.2.1 and 13.2.4 of the Nevada air quality regulations specifically require a permit application for construction of any new parking facility or other structure with associated parking facilities for 1,000 or more cars.

11. Under § 13.1.1 of the Nevada air quality regulations, the owner of a proposed new complex source must apply to the director of the Department of Human Resources for a registration certificate and must submit an environmental evaluation of the project. If the environmental evaluation shows, or if the Director determines that the source will prevent the attainment or maintenance of an applicable ambient air quality standard, the Director may not issue a registration certificate, under the terms of Regs. § 13.1.3.

12. On August 12, 1974, defendant Kahle submitted an application for a registration certificate for a new hotel and casino to be constructed on a 24-acre parcel at Highway 50 and State Route 19 in Stateline, Nevada. The plans call for 33,512 square feet of casino floor space, 960 hotel rooms, and miscellaneous theatre, dining and meeting facilities, with parking for 2,400 cars. On the basis of the environmental analysis and amendments thereto submitted by defendant Kahle, defendant Trounday concluded that construction of the hotel-casino as planned would result in violations of CO ambient standards and accordingly required major changes in the amount of casino floor space, highway access plans, and parking garage operations procedures. With these changes, defendant Trounday concluded that such violations would not occur and, accordingly issued registration certificate No. 88 to defendant Kahle on May 19, 1975.

13. On August 12, 1974, defendant Jennings submitted an application for a registration certificate for a new hotel and casino to be constructed on a 20-acre parcel across Highway 50 from the proposed Hotel Oliver in Stateline, Nevada. The plans call for 32,350 square feet of casino floor space, 560 hotel rooms, and various convention and theatre facilities, with parking for 1,600 cars. On the basis of the environmental analysis submitted by defendant Jennings, defendant Trounday concluded that construction of the hotel and casino as planned would result in violations of ambient CO standards, and accordingly required major changes in the amount of casino floor space, highway access plans, and parking garage operations procedures. With these changes, defendant Trounday concluded that such violations would no longer occur and thus issued registration certificate No. 84 to defendant Jennings on April 15, 1975.

14. The findings by defendant Trounday that construc- of the two hotel-casinos described in paragraph 10 and 11 were based on improper assumptions and did not take into account all the evidence available to him. As such, those findings constituted an abuse of discretion. Specifically, his analysis did not take into account the situation that would occur under the most adverse meteorological conditions and failed to consider CO levels within the project areas. Upon the request of plaintiffs, defendant Trounday's subordinates recalculated expected CO levels within the hotel grounds under adverse conditions using the same methodology that had been employed to asses the applicants' environmental analyses. The results of that recalculation showed that the one-hour CO standard would be

exceeded by 7% and, by extrapolation, that the eight-hour standard would be exceeded by over 100%. In addition, defendant Trounday ignored evidence that the CO standards are already being exceeded at various locations along Highway 50 and that the additional traffic on the highway generated by the two casinos would cause even more severe and frequent violations.

15. Since the construction of the Oliver and Tahoe Palace Hotels will cause violations of the ambient air quality standards for CO, defendants Kahle and Jennings could not properly be issued registration certificates under N.R.S. § 445.491(1)(b)(2) and Nevada air quality regulations § 13.1.3. Therefore, construction at the two hotels violates § 3.2.2 of the regulations. This constitutes a violation of an emission standard or limitation as that term is used in Clean Air Act § 304(a)(1), 42 U.S.C. § 1857h-2(a)(1).

16. On March 2, 1976, plaintiffs' attorney notified defendants of the violation described above, pursuant to the requirements of Clean Air Act § 304(b), 42 U.S.C. § 1857h-2(b) and 40 C.F.R. Part 54. More than 60 days has elapsed from the date on which the notice was sent.

17. Because of the unlawful action of defendant Trounday described in paragraphs 14 and 15 and the unlawful construction activity by defendants Kahle and Jennings, the ambient standards for carbon monoxide will be frequently violated. As a result, the health and welfare of the plaintiffs will be subject to irreparable injury.

Relief Requested

Wherefore, plaintiffs pray:

1. That this court enter its judgment declaring that registration certificate No. 88, issued to defendant Kahle and No. 84, issued to defendant Jennings are null and void.

2. That defendants Kahle and Jennings be ordered to cease construction on the Hotels Oliver and Tahoe Palace until valid registration certificates are obtained.

3. That plaintiffs be awarded their reasonable costs of litigation, including reasonable attorney's and expert witness' fees, as permitted by Clean Air Act § 304(d), 42 U.S.C. § 1857h-2(d).

4. That plaintiffs have such other and further relief as this Court may deem just and proper.

Respectfully submitted:

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Dated: June 2, 1976

Appendix D

State of Nevada
Environmental Commission
Administrative Rules

Adopted December 1, 1975
Effective January 9, 1976

Environmental Commission
Capitol Complex
Carson City, Nevada

State of Nevada
Environmental Commission
Administrative Rules

Rule 1: Definitions

1.1.1—"Appellant" means any person requesting a hearing before the Commission in compliance with Chapter 445 or 444 of NRS, or applicable sections of the State Air Quality Regulations, State Water Pollution Control Regulations, or State Solid Waste Management Regulations adopted pursuant thereto, or any person required by the Director to appear before the Commission.

1.1.2—"Commission" means the State Environmental Commission; or a panel of three or more members of the State Environmental Commission as per NRS Chapter 445, Sections 277 and 499, where appropriate.

1.1.3—"Director" means the Director of the Department of Human Resources or his designee, or person designated by or pursuant to a county or city ordinance or regional agreement or regulation to enforce local air pollution control ordinances and regulations.

1.1.4—"Person" means the State of Nevada or any individual, group of individuals, partnership, firm, company, corporation, association, trust, estate, political subdivision, administrative agency, public or quasi-public corporation or other legal entity.

1.2—The meanings ascribed to words not included in Rule 1 shall be in accordance with applicable sections of the State Air Quality Regulations, State Water Pollution Control Regulations, or State Solid Waste Management Regulations and Chapter 445 or 444 of NRS.

Rule 2: Availability of Regulations and Forms

2.1—The Commision will furnish to any member of the public, upon request, a copy of all regulations and procedures adopted or used by the Commission in the discharge of its function.

2.2—Also available for public inspection are all final orders, decisions, and opinions except those expressly made confidential or privileged by statute.

Rule 3: Petitions for Adoption, Filing, Amendment, Repeal of Regulations, Required Action by Commission.

3.1—Any interested person may petition the Commission, by requesting in writing in the format of form #1 (infra), for the adoption, filing, amendment or repeal of any regulation and shall accompany his petition with relevant data, views, and arguments.

3.2—Upon submission of such a petition, the Commission shall, within thirty (30) days, either deny the petition in writing, stating its reasons, or initiate regulation-making proceedings in accordance with NRS 445.204 and 445.207, or 445.466, or 444.560, whichever is/are applicable.

Rule 4: Public Inspection of Regulations, Orders, Decisions and Opinions; Validity

No Commission regulation, rule, final order or decision shall be valid or effective against any person or party; nor may it be invoked by the Commission for any purpose, until it has been made available for public inspection as required by Rule 2, except that this provision shall not be applicable in favor of any person or party who has actual knowledge thereof.

Rule 5: Effective Date of Regulations

5.1—Regulations shall become effective thirty (30) days after an original and three (3) duplicate copies of each regulation are filed with the Secretary of State, except where:

5.1.1—a later date is required by statute;

5.1.2—an earlier date is permitted by statute;

5.1.3—a later date is specified in the regulation; or

5.1.4—the Commission finds that an emergency exists, and such finding is concurred in by the Governor by written endorsement upon the original regulation.

Rule 6: Petitions for Declaratory Orders, Advisory Opinions; Form and Disposition

6.1—Any member of the public may petition the Commission for a declaratory order and/or an advisory opinion as to the applicability of any statutory provision, Commission regulation or decision. (See form #2 infra.)

6.2—Upon submission of such a petition in the format of form #2, the Commission shall within thirty (30) days issue such a declaratory order and/or advisory opinion in writing stating its reason(s) for such action.

6.3—Declaratory orders disposing of petitions in such cases shall have the same status as Commission decisions. A copy of the declaratory order and/or advisory opinion shall be mailed to the petitioner.

Rule 7: Judicial Declaratory Judgment Actions to Determine Validity, Applicability of Regulations

7.1—After complying with Rule 6 (supra) any member of the public may seek a judicial determination of the validity or applicability of any regulation in a proceeding for a declaratory judgment in the district court in and for Carson City, or in and for the county where the plaintiff resides, when it is alleged that the regulations, or its proposed application, interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff.

7.2—The Commission shall be made a party to any action filed under Rule 7.1. The Commission may institute an action for declaratory judgment, as provided in Rule 7.1, concerning any regulation adopted and filed by it or any other agency.

7.3—Actions for declaratory judgment provided for in Rules 7.1 and 7.2 shall be in accordance with the Uniform Declaratory Judgments Act (Chapter 30 of NRS) and the Nevada Rules of Civil Procedure. In all actions under Rules 7.1 and 7.2, the Attorney General shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard.

Rule 8: Request for Hearing to Appeal Action of the Department

Any person requesting a hearing before the Commission pursuant to Chapter 445 or 444 of NRS may do so by filing his request, within ten (10) days of notice of action of the Department, with the Environmental Com-

mission, 1209 Johnson Street, Capitol Complex, Carson City, Nevada, 89710 (in the format of form #3 infra).

Rule 9: Notice of Hearing

The Secretary of the Environmental Commission shall schedule a hearing to be held within twenty (20) days after receipt of the request for hearing, or an order to appear before the Commission. All of the parties shall be notified by registered or certified mail of the date thereof which shall be no less than five (5) days after the date of notification. The notice shall include:

9.1—a statement of the time, place, and nature of hearing:

9.2—a statement of the legal authority and jurisdiction under which the hearing is to be held;

9.3—a reference to the particular sections of NRS and/or the Air Quality Regulations, Water Pollution Control Regulations, or Solid Waste Management Regulations allegedly violated;

9.4—a brief and concise statement of the matters asserted or the issues involved.

Rule 10: Subpoenas

10.1—Subpoenas to compel attendance of any persons at a hearing or to require the production of books, records, or other documents may be issued by the Commission. Requests for the issuance of subpoenas shall be made to the Commission in writing no less than five (5) days prior to the hearing date, setting forth the reason and necessity for such subpoena(s); provided that, upon good cause shown, subpoenas may be issued at the request of any party to the hearing at any time. The Commission may issue any subpoena(s) on its own initiative without request.

10.2—All costs incident to subpoenas issued at the request of appellant shall be borne by the appellant. The Commission may demand payment of such costs prior to issuance of subpoenas.

Rule 11: Hearing Panel

Three or more members of the Commission shall constitute a proper panel, where appropriate, in accordance with Chapter 445, Sections 277 and 499, and a majority of those present must concur in any decision which shall be in writing and of public record.

Rule 12: Preliminaries to Hearing

12.1—Upon good cause shown, the Commission may vacate and reset the time of hearing.

12.2—Upon good cause shown, the Commission may transfer the place of hearing to a more appropriate location, taking into consideration the convenience and fairness to the witness and the parties.

12.3—Unless otherwise provided by law, informal disposition may be made by all involved parties at any time of any contested case or matter.

Rule 13: Appearance of Parties; Order of Presentation

13.1—The Parties may appear in person and may be represented by counsel. All testimony shall be given under oath, and recorded verbatim by human or electronic means. The matter shall then be heard in the following manner:

13.1.1—prior to testifying, the witness shall state his *name*, *address*, and *business*, *employment* or *position*. Subsequent comments and testimony may be preceded by name only;

13.1.2—opening statement and presentation of State's evidence followed by cross-examination by appellant;

13.1.3—opening statement and presentation of evidence by appellant followed by cross-examination by State;

13.1.4—The parties may then respectively offer rebutting testimony only, unless the Commission, in its discretion, permits additional evidence. In the exercise of its discretion, the Commission shall consider the relevance and necessity of the new matter expected to be brought out by the additional testimony;

13.1.5—closing argument of State, closing argument of appellant, rebuttal by State.

13.2—Hearings shall be public unless and until such time as confidential information, within the meaning of Chapter 445 of NRS or applicable sections of the State Air Quality Regulations, or Water Pollution Control Regulations, must be admitted to the record, at which time the hearing shall be closed.

Rule 14: Rules of Evidence

14.1—Evidence of the type commonly relied upon by reasonable and prudent men in the conduct of their affairs shall be admitted unless such admission is otherwise precluded by law.

14.2—All irrelevant, immaterial, and unduly repetitious evidence shall be excluded.

14.3—All privileges recognized by law shall be given full effect.

14.4—Duly authenticated copies of original documents that are not readily available may be received in evidence.

14.5—All objections to evidentiary offers shall be noted in the record.

14.6—The Commission, State and appellant may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter even though such matter was not covered in direct examination, impeach any witness regardless of which party called the witness to testify, and rebut evidence.

14.7—Notice may be taken of judicially cognizable facts and of generally recognized scientific and technical facts within the specialized knowledge of the Commission or other expert witnesses subpoenaed by the Commission. Any aggrieved or affected party shall be afforded the opportunity to discredit or rebut matters of which official notice has been taken.

14.8—The expertise, technical competence and specialized knowledge of the Commission or State may be utilized in determining the admissibility of evidence, as well as in the evaluation of the evidence.

Rule 15: Commission Findings; Recommendations

15.1—At the conclusion of the hearing the Commission shall take the case under submission, and shall notify the appellant by certified mail of its findings and recommendations in writing within thirty (30) days after the date of the hearing.

15.2—Final recommendations shall be in writing and shall separately state findings of fact and conclusions of law. Findings of fact and recommendations shall be based upon substantial evidence. Findings of fact shall include a concise statement of the evidentiary facts supporting the findings.

Rule 16: Transcripts

Transcripts will be furnished to any party upon payment of the fees prescribed by the Commission.

Rule 17: Judicial Review of Final Decisions in Contested Cases

17.1—Any party aggrieved by a final decision in a contested case is entitled to judicial review thereof under NRS Chapter 233B. Any preliminary procedural or intermediate Commission act or ruling is immediately reviewable in any case in which review of the final Commission decision would not provide an adequate remedy.

17.2—Proceedings for review shall be instituted by filing a petition in the district court in and for Carson City, or in and for the county in which the aggrieved party resides, or in and for the county where the act on which the proceeding is based occurred, within thirty (30) days after the service of the final decision of the Commission, or, if a rehearing is held, within thirty (30) days after the decision thereon. Copies of the petition shall be served upon the Commission and all other parties of record.

Adoption: Now therefore, by affirmative vote of the Nevada State Environmental Commission, these rules of procedure are hereby adopted and compliance therewith ordered.

To become effective January 9, 1976.

/s/ ROLAND WESTERGARD
Roland Westergard,
Vice-Chairman
Environmental Commission

Form #1

Form for Petitioning the Commission for Adoption, Filing, Amendments, or Repeal of Commission Regulations

1. Name, address, telephone number and signature of petitioner. Also their representative capacity if applicable.

2. Specific type of petitioner (individual, partnership, corporation, or other) and the exact business or occupation, including a description of the business or occupation if necessary.

3. Exact and specific nature of changes sought, including delineation of the regulations, statutory provisions, or Commission decisions involved.

4. Petitioner's reason(s) for requesting change(s), including whether in self interest, in the public interest, or any other legal entity's or individual's interest.

5. An expression of what particular group(s) of people would be most affected either positively or negatively by the proposed change(s).

6. Date of petition.

Form #2

Form for Petitioning the Commission for a Declaratory Order or Advisory Opinion

1. Name, address, telephone number, and signature of petitioner. Also their representative capacity if applicable.

2. Specific type of petitioner (individual, partnership, corporation, or other) and the exact business or occupation including a description of the business or occupation if necessary.

3. Exact and specific nature of order or opinion sought, including delineation of the regulations, statutory provision, or Commission decision involved.

4. Petitioner's reason for requesting the declaratory order and/or advisory opinion including whether in behalf of self interest, the public interest, or any other legal entity's or individual's interest.

5. An expression of what particular group(s) of people would be most affected, either positively or negatively, by the declaratory order, and/or advisory opinion.

6. Date of petition.

Form #3

Form for Requesting an Appeal Hearing Before the Commission

1. Name, address, telephone number, and signature of applicant:
   Name: _____
   Address: _____
   Telephone: _____
   Signature: _____
   Representative Capacity (if applicable): _____
2. Specify type of applicant: Individual, Partnership, Corporation, or Other: _____
   _____
3. Other person or persons authorized to receive service of notice.
   _____
   _____
4. Complete description of the business or activity and the location of the activity involved in the request: _____
   _____
   _____
   _____
5. Nature of the appeal and grounds therefor: _____
   _____
   _____
6. Section or sections of the State Air Quality Regulations, Water Pollution Control Regulations, or Solid Waste Management Regulations, or NRS sections involved in the appeal: _____
   _____
   _____
7. Approximate time in hours and minutes necessary for delivery of oral testimony and reading of prepared statements as admissible evidence to be entered in the record: _____
   _____

Date of Request: _____